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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 588

HENRY E. OPPENHEIMER,

Petitioner,

against

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK and HENRY E. COOPER as Conservator of THE HARRIMAN NATIONAL BANK AND TRUST COMPANY,

Respondents.

No. 670

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK,

Petitioner,

against

HENRY E. OPPENHEIMER,

Respondent.

ON WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR HENRY E. OPPENHEIMER, PETITIONER IN NO. 588 AND RESPONDENT IN NO. 670.

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INDEX.

	PAGE
Judgment under review and errors claimed by the respective petitioners	1
Opinions below	3
Jurisdiction	3
Summary statement of the matters involved	3
Statute involved	9
Specification of error	9
Outline of argument	10
No. 588	10
No. 670	11
POINT I—Plaintiff's judgment is entitled to share equally in the receivership estate with other unsecured creditors' claims	12
A. On the assumption that the paid-in stock sold by the Bank was owned by it, the plaintiff may, to the extent of his judgment for the fraud, share equally with other unsecured creditors in the receivership estate	13
(1) Common law and rationale of plaintiff's position	15
(2) The effect of the statute respecting National Bank shareholders' liability for assessment	21
B. On defendant's own view of the facts, *i. e.*, that the sale to the plaintiff was of stock actually owned by a third party, the Bank acting merely as an agent in the transaction, plaintiff's judgment is plainly entitled to equal ranking	31

PAGE

POINT II—Assuming that where rescission is effected subsequent to "insolvency" the judgment thereon must be subordinated, that rule does not apply to the case at bar. The rescission and institution of the present action occurred months prior to the finding and declaration of insolvency by the Comptroller of the Currency. It is the date when such finding and declaration were made (and not the date when the Bank became unable to meet its obligations as they matured) that is controlling 32

POINT III—Plaintiff is a defrauded *depositor*. The merits of his case are equal to those of other depositors and general creditors 37

POINT IV—In refutation of the contentions of the defendant Bank, as cross-petitioner in No. 670 38

The contentions that the plaintiff may not recover any judgment against the defendant Bank upon the grounds

(a) That the National Banking Act (12 U. S. C., Section 63) forbids the application of the fund raised by assessment of shareholders to the payment of non-contract claims (from which it is supposed to follow that there is no source out of which such claims may properly be satisfied); 38

(b) That the Act (12 U. S. C., Section 24 (7), and Sections 83, 56 and 59) absolutely prohibits rescission of stock purchases as against solvent and insolvent Banks; 42

(c) That the defendant Bank is not chargeable with the fraudulent representations of its officers in connection with the sale, ... 44

are plainly erroneous 38

CONCLUSION—The resettled judgment of the Circuit Court of Appeals for the Second Circuit should be modified 50

Cases Cited.

	PAGE
Aldrich v. *Chemical Nat. Bank*, 176 U. S. 618	41, 50
American S. Co. v. *DeCarle*, 25 F. (2d) 18 (C. C. A. 9)	34
American Surety Co. of New York v. *Philippine National Bank*, 245 N. Y. 116, *cert. den.*, 275 U. S. 549	50
Anderson v. *Cronkleton*, 32 F. (2d) 170 (C. C. A. 8)	22
Appleton v. *Citizens Central National Bank*, 190 N. Y. 417, *aff'd*, 216 U. S. 196	50
Awotin v. *Atlas Exchange Bank*, 295 U. S. 209	42
B. V. Emery & Co. v. *Wilkinson*, 72 F. (2d) 10 (C. C. A. 10)	23
Bereth v. *Sparks*, 51 F. (2d) 441 (C. C. A. 7)	42
Birmingham v. *Burke*, 67 Utah 90	18
Bryan v. *Welch*, 74 F. (2d) 964 (C. C. A. 10), *cert. den.*, 295 U. S. 748	16, 26
Case v. *Citizens' Bank*, 100 U. S. 446	41
Christopher v. *Norvell*, 201 U. S. 216	21
Clark v. *Boston-Continental National Bank* (two cases), 84 F. (2d) 605, 607 (C. C. A. 1)	13, 16, 28
Clinton Mining & Mineral Co. v. *Beacom*, 266 Fed. 621 (C. C. A. 3), *cert. den.*, 254 U. S. 637	42
Cook County Nat. Bank v. *United States*, 107 U. S. 445	34
Cunningham v. *Brown*, 265 U. S. 1	15
Doerstler v. *First National Bank*, 82 Ore. 92	47
Duffy v. *Treide*, 75 F. (2d) 17 (C. C. A. 4)	15, 16, 26
East Broken Hills Consols, Ltd. v. *Mallaby-Deeley*, 11 T. L. R. 241 (Q. B. Div.), *aff'd*, *id.*, p. 245 (Ct. App.)	20
Eastin v. *Bank of Harrisonville*, 213 Mo. App. 130	47
Easton v. *Iowa*, 188 U. S. 220	35

PAGE

First National Bank of Silverton v. *Mercantile National Bank of Pueblo*, 273 Fed. 119 (C. C. A. 8) 47
Florida Land & Imp. Co. v. *Merrill*, 52 Fed. 77 (C. C. A. 5) 13, 16, 30
Forrest v. *Jack*, 294 U. S. 158 21

Houldsworth v. *City of Glasgow Bank and Liquidators*, 5 App. Cas. 317 20

In re Hull & County Bank, 15 Ch. Div. 507 20
In re Morris Bros., 293 Fed. 294 (C. C. A. 9) 16, 17
In re Outdoor Clothing Co., 10 F. Supp. 617, *aff'd*, 77 F. (2d) 1009 (C. C. A. 2) 15
In re Sherman, 13 F. (2d) 121 (C. C. A. 2) 15
In re Weissman, 19 F. (2d) 769 (C. C. A. 2) 15
Independent Van & Storage Co. v. *Iowa Mercantile Co.*, 189 Iowa 874 14, 16

James-Dickinson Farm Mortgage Co. v. *Harry*, 273 U. S. 119 47
Jones v. *H. M. Hobbie Grocery Co.*, 246 Fed. 431 (C. C. A. 5) 15
Julian v. *Stewart*, 56 F. (2d) 32 (C. C. A. 5) 14, 16, 30, 31

Kent v. *Freehold Land & Brick-Making Co.*, [1868] L. R. 3 Ch. 493 20
King v. *Armstrong*, 50 Ohio St. 222 41

Lantry v. *Wallace*, 182 U. S. 536 22, 46
L'Herbette v. *Pittsfield National Bank*, 162 Mass. 137 47
Litchfield Bank v. *Peck*, 29 Conn. 384 16, 31

MacNamee v. *Bankers' Union for Foreign C. & F.*, 25 F. (2d) 614 (C. C. A. 2) 16, 19
Manly v. *Ohio Shoe Co.*, 25 F. (2d) 384 (C. C. A. 4) 15
McClure v. *Central Trust Co.*, 165 N. Y. 108 45
McDonald v. *Chemical National Bank*, 174 U. S. 610 34

PAGE

Merrill v. *Florida Land & Imp. Co.*, 60 Fed. 17 (C. C. A. 5) 13, 16, 30
Merrill v. *National Bank of Jacksonville*, 173 U. S. 131 34

National Bank of Commerce v. *Equitable Trust Co.*, 227 Fed. 526 (C. C. A. 8), *cert. den.*, 239 U. S. 648 50
National Bank & Loan Co. v. *Petrie*, 189 U. S. 423 46
National City Bank v. *Carter*, 14 F. (2d) 940, 31 F. (2d) 25 (C. C. A. 6) 47
Nevada Bank v. *Portland National Bank*, 59 Fed. 339 (D. Ore.) 50

Oakes v. *Turquand*, [1867] L. R. 2 H. L. 325 ..... 19, 20
O'Connor v. *Bankers Trust Company*, 159 N. Y. Misc. 920 36
Oppenheimer v. *Harriman National Bank*, 85 F. (2d) 583 ..... 4, *etc.*

Page v. *Jones*, 7 F. (2d) 541 (C. C. A. 8) 21
Phillips v. *Mercantile National Bank*, 140 N. Y. 556 47
Pufahl v. *Parks*, ... U. S. ....., 81 L. Ed. *73 21

Rankin v. *Emigh*, 218 U. S. 27 41
Richardson v. *Olivier*, 105 Fed. 277 (C. C. A. 5) 16, 22, 24, 25
Ryan v. *Mt. Vernon National Bank*, 224 Fed. 429 (C. C. A. 2) 22

Salter v. *Williams*, 244 Fed. 126 (C. C. A. 3), *app. dism.*, 250 U. S. 653 ..... 13, 16, 25, 26, 28, 29, 30, 42, 46, 50
Salter v. *Williams*, 219 Fed. 1017 (D. N. J.) 26
Schechter v. *Sherwin*, 81 F. (2d) 603 (C. C. A. 7) 43
Scott v. *Armstrong*, 146 U. S. 499 ..... 15, 34
Scott v. *Deweese*, 181 U. S. 202 22
Singleton v. *Harriman National Bank*, 152 Misc. 323, *aff'd*, 241 N. Y. App. Div. 857 5
Stanton v. *Wilkenson*, Fed. Cas. No. 13,299 (S. D. N. Y.) 41
Sternberg v. *American Snuff Co.*, 69 F. (2d) 307 (C. C. A. 8) 15

PAGE

Stone v. *City & County Bank, Ltd.*, [1877] L. R. 3 C. P. Div. 282 20
Stewart v. *Wright*, 147 Fed. 321 (C. C. A. 8) 47
Studebaker v. *Perry*, 184 U. S. 258 39

Texas & Pacific Railway v. *Abilene Cotton Co.*, 204 U. S. 426 21
Turner v. *First Nat. Bank*, 26 Iowa 562 42

Wasmann v. *City National Bank of Knoxville*, 52 F. (2d) 705 (C. C. A. 6) 47
White v. *Knox*, 111 U. S. 784 34
William B. Joyce & Co. v. *Eifert*, 59 Ind. App. 190 16
Williams v. *Green*, 23 F. (2d) 796 (C. C. A. 4) 13, 15, 16, 29, 31

Yardley v. *Philler*, 167 U. S. 344 34

STATUTES CITED.

National Banking Act:

12 U. S. C., Section 24 (7) 38, 42, 43
Section 56 ..... 38, 43
Section 59 ..... 38, 43
Section 63 (and 64) 8, 9, 14, 30, 38, 41
Section 83 ..... 38, 43, 46
Section 191 ..... 34, 35
Section 192 41
Section 194 ..... 34, 41
Section 203 33

Authorities Cited.

	PAGE
Am. L. Inst., Restatement of Agency, Sections 257, 258, 321, 341	45, 46
A. L. R., Vol. 41, p. 674; Vol. 46, p. 484; 1936 Supp., p. 294	19
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Cook, Corporations (8th Ed.), Section 541	16
Fletcher, Cyclopedia of Corporations, Vol. 11, Section 5324	16
Michie, Banks and Banking, Section 173	46

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BRIEF FOR HENRY E. OPPENHEIMER, PETITIONER IN NO. 588 AND RESPONDENT IN NO. 670.

Judgment Under Review and Errors Claimed by the Respective Petitioners.

These two cases present for review the resettled judgment of the United States Circuit Court of Appeals for the Second Circuit, entered November 9, 1936 (R. 132-3), in an action at law for damages upon the executed rescission of a fraudulent sale of certain shares of stock, which action was originally entitled "Henry E. Oppenheimer,

Plaintiff, against The Harriman National Bank and Trust Company of the City of New York and Henry E. Cooper as Conservator, *etc.*, Defendants." Said resettled judgment:

(1) reverses a judgment of the District Court for the Southern District of New York in favor of defendants The Harriman National Bank and Trust Company (hereinafter called "the Bank") and its Conservator entered upon an order directing a verdict for the defendants after cross-motions at the trial for a directed verdict;

(2) orders that judgment be entered for the plaintiff Oppenheimer against the defendant Bank (which went into receivership after this action was started)* for the amount demanded in the complaint, *but that the judgment should be "collectible out of the assets of the receivership after payment in full of all who were creditors when the said bank became insolvent"* (R. 132-3).

Plaintiff Oppenheimer, as petitioner in No. 588, contends that the judgment should not have been so subordinated but should have been given equal ranking with other unsecured creditors' claims, and seeks a modification of the resettled judgment of the Circuit Court of Appeals to this effect. The defendant Bank, as petitioner in No. 670, contends that the plaintiff is not entitled to any judgment whatever and seeks to reinstate the judgment of the District Court in favor of the defendant Bank.

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* The action was ordered dismissed as to the defendant Conservator "in as much as it appears that a receiver was appointed for said Bank during the pendency of said action" (R. 132).

Opinions Below.

The District Court stated its reasons for directing a verdict in favor of the defendants (at R. 46) but did not file a formal opinion. The amended opinion of the Circuit Court of Appeals upon reversal (R. 111-116) is reported in 85 F. (2d) 583.

Jurisdiction.

Petition and cross-petition for writs of *certiorari* (Nos. 588 and 670 respectively) were applied for under Section 240(a) of the Judicial Code (28 U. S. C., Section 347[a]) and were granted by this Court on February 8, 1937 (R. 135).

Summary Statement of the Matters Involved.

The action is at law for damages upon an executed rescission of the sale to the plaintiff Oppenheimer of certain shares of stock of the defendant Bank. The complaint (R. 2-5) alleges that the plaintiff was and still is a depositor in the Bank; that as a result of fraudulent representations made by the Bank to the plaintiff as a depositor, he was induced to and did purchase ten shares of Bank stock on November 1, 1930 at a price of $15,120 (the par amount of the stock being $100 each); that the purchase was made in reliance on false representations made by the Bank with intent to deceive the plaintiff, and that as soon as the plaintiff discovered the fraud he elected to and did rescind the transaction, giving notice thereof on May 6, 1933 to both the Bank and its Conservator (who was appointed on March 13, 1933) and tendering back the stock. He sues for the price paid less proper offsets, joining the Bank and

its Conservator as parties defendant. The action was instituted on May 31, 1933 (R. 1). The Comptroller of the Currency did not declare the Bank insolvent or appoint a receiver for the Bank until October 16, 1933 (R. 39; Cross-pet. for cert., p. 2; R. 122-3).

The plaintiff has paid the statutory assessment levied against him as a National Bank stockholder (without prejudice to the present action) and has in no respect challenged that assessment nor sought repayment thereof (R. 39).

The facts proved under the complaint, as well as the defenses interposed by the defendants, are fairly summarized in the following extract from the amended opinion of the Circuit Court of Appeals herein (R. 111-113):

"The plaintiff, Henry E. Oppenheimer, was a depositor in the Harriman National Bank, of which Joseph W. Harriman was president and F. S. Williamson was a vice-president. On October 28, 1930, Williamson called upon Oppenheimer, presenting a letter of introduction on bank stationery signed by Harriman. Relying upon statements made in the letter and oral statements made by Williamson, Oppenheimer was induced to purchase ten shares of stock of the bank at the price of $15,120. On November 1, he received from the bank a bill therefor which he paid by a check drawn upon his account in the bank and payable to its order. Another vice-president of the bank, Mr. Austin, acknowledged receipt of his check and sent him a stock certificate for the purchased shares. His check was marked 'Paid' and the bill was receipted. During 1931 and in January, 1932, Oppenheimer received dividends on the stock aggregating $525. He sold two shares in May, 1932, for the price of $2,408 and thereafter received a new certificate for his remaining eight shares. In the spring of 1933,

when he saw a newspaper reference to the *Singleton* case,* he discovered that the statements which had induced his purchase were false and fraudulent. Thereupon, on May 6, 1933, he gave notice of rescission, tendered back the certificate, and demanded that his account in the bank be credited with the amount of his payment, less the sums received by him as dividends and from his sale of the two shares disposed of. The bank in the meantime had closed its doors and the defendant Cooper had been appointed its conservator. The plaintiff's demand for rescission being rejected, this action was instituted on May 31, 1933. It seeks judgment for $12,187 with interest from November 1, 1930. During pendency of the action, a receiver was appointed for the bank [on October 16, 1933], but he has not become a party to this suit.

"The amended answer of the defendants, besides a general denial, sets up the affirmative defenses of ratification after knowledge of the fraud, and of laches. [*These affirmative defenses were abandoned at the trial.*] At the trial the defendants were allowed further to amend 'tentatively' by setting up that on and after March 4, 1933, the bank was insolvent and that debts incurred since November 1, 1930, cannot be paid out of its assets. The District Court reserved decision on whether this tentative amendment constituted a defense and never formally ruled upon it.

"The defendants' proof tended to show that the stock purchased by Oppenheimer was not owned by the bank but by its affiliate, Harriman Securities Corporation. The bank maintained in its bond department an account known as 'Harriman Securities Corporation Suspense Account,' in

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* [Court's footnote] *Singleton* v. *Harriman National Bank*, 152 Misc. 323, aff'd 241 N. Y. App. Div. 857.

which were reflected purchases and sales of Harriman Bank stock made for the account of said affiliate. To the extent that the account was long of the stock it represented an indebtedness of the affiliate to the bank. Certificates of stock purchased for the suspense account were put in the name of one Kelly, not an employee of the bank, as nominee of the Securities Corporation. The ten shares sold to Oppenheimer stood in Kelly's name, and the suspense account was credited with the sum received by the bank from Oppenheimer, less $100 retained by the bank as its commission on the sale. It is conceded, however, that Oppenheimer had no knowledge of any transactions between the bank and its affiliate and believed that he was dealing with the bank as a principal in his purchase of the stock. It was also conceded that a fraud was practised upon him by Harriman and Williamson,* the dispute as to this being only whether the bank is chargeable with their fraud."

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* The fraud referred to by the court consisted of the following: The market for the Bank stock had been artificially rigged over a considerable period of time by regular purchases of the stock (usually at the close of each business day) by the Bank, which placed the stock so acquired into the "suspense account." For about two years these final bids, which were relayed from over-the-counter dealers to certain dealers' associations and thence to the newspapers, reflected almost exclusively sales by the dealers to the Bank. There was no real market; the public quotations were fictitious; they concealed a continuous and drastic decline in real value.

As part of the scheme it became necessary to unload the stock which had been so acquired. This was done by inducing certain depositors to buy Bank stock by reference to the deceptive public market quotations and by other fraudulent representations. Among other things Williamson referred the plaintiff to the quotations and stated that the stock came "from an estate." He knew that the market was rigged and he knew that the stock did not come from an estate but from the "suspense account."

As stated by the Circuit Court of Appeals, the defendants frankly conceded that a fraud was practiced upon the plaintiff (R. 27). See *infra*, pp. 47-50, for a fuller description of the fraud.

At the conclusion of the evidence both parties moved for a directed verdict. The district judge granted the defendants' motion on the ground (1) that the Bank was not enriched by the sale of the stock to the plaintiff, and (2) that neither Harriman nor Williamson had actual or apparent authority to make the representations which induced his purchase. From the judgment entered pursuant to the directed verdict the plaintiff appealed.

The Circuit Court of Appeals reversed the judgment of the District Court, holding:

> (a) That the stock purchase could be rescinded for fraud antedating the "insolvency" of the Bank although asserted through demand and suit after the "insolvency" of the Bank.
>
> (b) That it was immaterial "whether the bank, as a principal, sold its own stock, or, as an agent, sold stock owned by the Securities Corporation. • • • In either event, the plaintiff dealt only with the bank; he had no knowledge that any third party was involved. If the bank sold stock belonging to its affiliate, as the defendants contend, it sold for an undisclosed principal and was itself a party to the contract. • • • Therefore, whether the stock belonged to the bank or to the Securities Corporation, the fundamental issue is the same, namely, whether the fraudulent representations of Harriman and Williamson are attributable to the bank" (R. 114).
>
> (c) That it was "indubitably plain that these officers had apparent, if not actual, authority to make the sale on behalf of the bank. • • • If this be so, their representations incidental to the sale by the bank (either as principal or agent) are attributable to the bank, since the plaintiff had no notice that the representations were unauthorized" (R. 114, 115).

For these reasons the plaintiff was held entitled to a judgment for the amount demanded in the complaint.

Coming, however, to the precise point under review in No. 588, namely, the question of the ranking of plaintiff's judgment as a claim against the Bank in receivership, the court ruled that, as the rescission, effected by demand and tender on May 6, 1933, took place after the Bank became "insolvent," the judgment should be *subordinated to the claims of all who were creditors of the Bank at the time it became "insolvent."* It is noteworthy that "insolvency" was conceded as of March 3, 1933 (R. 34), *i. e.*, it was conceded that the Bank was then unable to meet its obligations as they accrued (R. 38, 122-3); but it was not until October 16, 1933, several months after the present action was instituted, that a receiver was appointed and a formal declaration of insolvency made (R. 39; Cross-pet. for cert., p. 2; R. 122-3).

Thus the court, in an action at law, adopted the unusual procedure of entering a "subordinated" judgment. The court noted that "such a judgment will very likely have only an academic value" (R. 116). And recognizing that its decision was in conflict with clear authority elsewhere, it advanced as a ground to support its decision only an asserted "necessary implication" from the Federal statute as to National Bank shareholders' liability for assessment —12 U. S. C., Section 63 (and 64). But, as above noted, the plaintiff has complied with that statute by actually paying the stock assessment levied against him thereunder, and has in no respect challenged the assessment or sought repayment thereof.

The facts will be treated in greater detail where necessary in the course of this Brief.

Statute Involved.

The court deemed relevant 12 U. S. C., Section 63 (and 64):

> "§63. *Individual liability of shareholders.* The shareholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; • • •"
>
> "§64. *Individual liability of shareholders; transfer of shares.* The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure."

Specification of Error.

Plaintiff contends that his judgment should have been held entitled to rank on a parity with other unsecured creditors' claims.

Outline of Argument.

No. 588

As petitioner in No. 588, plaintiff Oppenheimer, raising no objection to the procedural propriety of a "subordinated" judgment in an action at law, contends that his judgment for the fraud practiced upon him by the Bank is entitled to share equally in the receivership estate with the claims of other unsecured creditors. The effect of such a decision would be merely to undo the fraud. The plaintiff was originally a depositor and was induced by fraud to become a stockholder. In this action he seeks to reinstate his deposit balance in the Bank to the extent of the withdrawal therefrom used to make the stock purchase, which will place him in the same position as his fellow depositors. He does not attempt to assert any preference or priority.

The plaintiff contends that, the stock fraudulently sold having been previously issued and paid-in, and the plaintiff having actually paid the stock assessment levied against him, he has a right to share equally in the receivership estate with other general creditors to the extent of his judgment for the fraud. This contention will be developed below on the alternative assumptions that the Bank was selling stock owned by it, and, *a fortiori*, on defendant's own view of the facts, *i. e.*, that the sale was of stock actually owned by a third party, the Bank acting merely as an agent in the transaction. All Circuit Courts of Appeals, except the court below,* which have faced the precise issue in respect to National Banks, have accorded equal ranking to

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* The Circuit Court of Appeals for the First, Third, Fourth and Fifth Circuits (see *infra*, pp. 13-14, 26-30).

claims such as the present, and these decisions are correct. (Point I.)

All of the foregoing proceeds on the assumption that the plaintiff effected his rescission *following* the "insolvency" of the Bank—it being entirely clear that if the rescission was effected prior thereto the plaintiff would be entitled to share equally. In point of fact, however, the plaintiff rescinded and brought suit several months before the finding and declaration of insolvency by the Comptroller of the Currency which accompanied the appointment of a receiver. It is contended that the date of such official finding and declaration of insolvency is the only material date. (Point II.)

There is special reason for according the plaintiff's judgment equal ranking herein. He is a defrauded *depositor*. The merits of his case are equal to those of other depositors and general creditors. (Point III.)

No. 670.

The defendant Bank, as petitioner in No. 670, has contended that plaintiff is entitled to no judgment whatever upon the alternative grounds that the National Banking Act forbids the application of the fund raised by assessment of stockholders to the payment of non-contract claims (from which it is supposed to follow that there is no source out of which such a claim can be satisfied) (Cross-pet. for cert., pp. 11-21); that the Act forbids rescission of a stock purchase against a National Bank whether solvent or insolvent (*id.*, pp. 21-27); that the Bank's officers did not have authority to effect the sale or make representations in connection therewith and the Bank was not "enriched" by reason of the sale (*id.*, p. 28, ff.). These contentions are answered in Point IV.

POINT I.

Plaintiff's judgment is entitled to share equally in the receivership estate with other unsecured creditors' claims.

The essential facts in this case are: (1) The plaintiff was defrauded into changing his position as a depositor into that of a stockholder to the extent of the withdrawal from his deposit account used to make the stock purchase. (2) The fraud was committed by the Bank through its officers actually or apparently authorized to make the sale (and thus to make representations incidental thereto). (3) The fraud antedated the insolvency of the Bank. (4) The plaintiff acted with diligence in disaffirming the transaction, and laches and estoppel are concededly out of the case (R. 115). (5) The stock sold to the plaintiff was issued and fully paid-in many years before the sale to him. (6) In defendant's own view of the facts, the stock was actually owned by a third party, namely, the Harriman Securities Corporation, prior to the fraudulent sale, having been sold by the Bank as agent for the Securities Corporation. (7) The plaintiff has paid the statutory assessment levied against him in respect of the stock and does not seek recoupment or repayment thereof.

The case at bar is to be sharply distinguished from other somewhat related but distinct and different situations. This is *not* a case in which the plaintiff is seeking, because of the fraud of the Bank, to avoid completing payment on a subscription to an original issue of stock, or to avoid the statutory stock assessment. Nor is he seeking to impress a constructive trust upon the assets of the receivership, or

to establish a preferential claim superior to those of other creditors. He seeks merely to have his claim rank on a parity with the claims of the other depositors.

We shall attempt to show, first, that the plaintiff has a right to share ratably with other unsecured creditors upon the assumption that the fraud arose in connection with the sale by the Bank of stock owned by it (the stock being concededly paid-in stock) (*infra*, A); and, second, that such right exists *a fortiori* in the case where (on the defendant's view of the facts) the Bank made fraudulent representations in selling stock as agent for a third person (*infra*, B).

A. On the assumption that the paid-in stock sold by the Bank was owned by it, plaintiff may, to the extent of his judgment for the fraud, share equally with other unsecured creditors in the receivership estate.

With the exception of the court below, Circuit Courts of Appeals presented with the precise issue at bar have taken the position that a stockholder who is not guilty of laches or other inequitable conduct and has fully paid his stock assessment may, on proof of fraudulent misrepresentations, rescind the sale even after the receivership of the Bank—a proposition also adopted as basic by the court below—and thereupon assert a claim which shall share *pari passu* with those of other unsecured creditors. *Salter* v. *Williams*, 244 Fed. 126 (C. C. A. 3), *app. dism.*, 250 U. S. 653; *Clark* v. *Boston-Continental National Bank*, 84 F. (2d) 605 (C. C. A. 1); *Same* v. *Same*, 84 F. (2d) 607 (C. C. A. 1); *Florida Land & Imp. Co.* v. *Merrill*, 52 Fed. 77 (C. C. A. 5); *Merrill* v. *Florida Land & Imp. Co.*, 60 Fed. 17 (C. C. A. 5). See also, *Williams* v. *Green*, 23 F. (2d) 796 (C. C. A.

4); *Julian* v. *Stewart*, 56 F. (2d) 32 (C. C. A. 5); *Independent Van & Storage Co.* v. *Iowa Mercantile Co.*, 189 Iowa 874. These cases, which will be considered more fully below, stand upon the following analysis: The right to rescind for fraud is fixed by the fraud of the Bank when the fraud was practiced. That antedated the insolvency and the receivership. In the absence of laches or estoppel, the rescinding stockholder, after paying the assessment levied against him, approaches the receivership like any creditor whose claim was contracted before insolvency and before receivership. A right so fixed is not displaced or altered by the appointment of a receiver, who takes *cum onere*. Nor does the stock assessment statute, either expressly or by implication, purport to alter this result. To be sure, it imposes a liability for contribution on each share of stock appearing on the stock list; but the rescinding stockholder (here a defrauded depositor) has honored the statute by actually paying the assessment. So far as the statute may require that all issued stock shall have been fully paid in, that requirement was also satisfied by actual payment. In short, *qua* stockholder appearing on the stock list, the rescinding stockholder must pay the assessment; *qua* creditor to the extent of the fraud, he is entitled to a judgment collectible out of the receivership estate in the same way as any unsecured, general claim.

Despite these decisive authorities and the persuasive reasoning supporting them, and despite the fact that the plaintiff was a defrauded *depositor*, the court below subordinated the plaintiff's judgment. It rested its decision solely upon a "necessary implication" from 12 U. S. C., Section 63 (and 64), the statute as to stockholders' personal liability for assessment.

In order to test the validity of the court's thesis, it is essential to examine into the rights of defrauded stockholders obtaining at common law and then to determine the effect of the assessment statute upon those rights.

(1) *Common law and rationale of plaintiff's position.*

It is conceded that the plaintiff was a depositor of the Bank and was induced by fraudulent representations to use part of his deposit to purchase Bank stock. It is a well established doctrine that a defrauded party, if diligent, may rescind the transaction after the insolvency of the defrauder and establish a claim against its estate. *Cunningham* v. *Brown*, 265 U. S. 1; *In re Weissman*, 19 F. (2d) 769 (C. C. A. 2); *In re Sherman*, 13 F. (2d) 121 (C. C. A. 2); *In re Outdoor Clothing Co.*, 10 F. Supp. 617, *aff'd*, 77 F. (2d) 1009 (C. C. A. 2); *Manly* v. *Ohio Shoe Co.*, 25 F. (2d) 384 (C. C. A. 4); *Jones* v. *H. M. Hobbie Grocery Co.*, 246 Fed. 431 (C. C. A. 5); *Sternberg* v. *American Snuff Co.*, 69 F. (2d) 307 (C. C. A. 8). The fact that a receiver or trustee in bankruptcy has been appointed for the insolvent does not affect this right; such receiver or trustee succeeds to the property of the insolvent subject to all claims that might have been interposed against it. *Scott* v. *Armstrong*, 146 U. S. 499; *In re Sherman, supra; Williams* v. *Green, supra.*

It is equally clear that the circumstance that the defrauded party happens to be a stockholder of the insolvent corporation does not affect his claim as creditor nor subordinate it to those of other creditors. This is unquestionably the case where the claim of the stockholder is based upon a transaction other than the purchase of stock; for example: advances made to the corporation (*Duffy* v.

Treide, 75 F. [2d] 17 [C. C. A. 4]); a debt arising from prior declaration of dividends (*Bryan* v. *Welch*, 74 F. [2d] 964 [C. C. A. 10], *cert. den.*, 295 U. S. 748; 11 FLETCHER, CYCLOPEDIA OF CORPORATIONS, §5324; 2 COOK, CORPORATIONS [8th Ed.], §541); a deposit accepted by a Bank with knowledge of insolvency (*Richardson* v. *Olivier*, 105 Fed. 277 [C. C. A. 5]).

There is no valid reason why a claim for fraud arising from the sale of stock should be treated on any different basis. In the absence of laches or other inequitable conduct—factors which are concededly out of this case—such a claim has been held not to be subordinate to claims of other general creditors. *Salter, Clark, Merrill, Williams, Julian,* and *Independent* cases, cited *supra*, pp. 13-14; see also, *Litchfield Bank* v. *Peck*, 29 Conn. 384.

An authority seemingly opposed to this position and subordinating the claims of defrauded stockholders is *In re Morris Bros.*, 293 Fed. 294 (C. C. A. 9).* While this decision is wholly reconcilable on the grounds (a) that the fraud arose in connection with an original subscription, (b) that the court found the stockholder guilty of "laches" (*id.*, p. 296) and (c) rested to some extent upon a statute peculiar to Oregon (*id.*, p. 297), reference was made to a so-called "trust fund" theory as a reason for subordination. The position taken by the court is that "all the property of an insolvent corporation, and including amounts unpaid on stock subscriptions induced by corpo-

* The court below cited its own *dictum* in *MacNamee* v. *Bankers' Union for Foreign C. & F.*, 25 F. (2d) 614, 617 (C. C. A. 2), which in turn rests on the *Morris* case. The court below also cited *William B. Joyce & Co.* v. *Eifert*, 59 Ind. App. 190, but that case appears to have no bearing on the question of relative ranking of claims as between defrauded stockholders and creditors, since the company had no creditors.

rate fraud, is a trust fund for creditors to the exclusion of stockholders'' and consequently, ''given a corporation insolvent and unpaid subscriptions, corporate fraud inducing the subscriptions affords no stockholder a defense to collection, or ground for rescission, or basis for trust or lien, to the prejudice of corporate creditors. *A fortiori*, nor in respect to stock subscriptions paid.''

Assuming the validity of the so-called ''trust fund'' theory—a doctrine much discredited and qualified in this country—it is manifest that granting the defrauded stockholder a claim, to the extent of the fraud, on a parity with other general claims, does not conflict with that doctrine. The plaintiff herein is not seeking to avoid the collection of, nor to rescind an *original* subscription to capital stock, paid or unpaid (as was attempted in the *Morris* case), which, *arguendo*, would have the effect of reducing the capital fund held in ''trust'' for creditors. The stock has been paid for and the capital of the defendant Bank has been contributed. All plaintiff desires is to establish a claim not superior to but on a par with other claims, —that is, to reinstate his position as a depositor. To the extent that the plaintiff has been defrauded, he occupies the status of a creditor and claimant and he may, consistently with the ''trust fund'' theory, share as a creditor with others in the receivership assets. Indeed he is a member of the very class that the ''trust fund'' doctrine seeks to protect. To deny him this right would necessarily mean that a claimant who happens also to be a stockholder can never share equally, *qua* creditor, in the assets of an insolvent corporation. It is manifest that the ''trust fund'' theory, whatever its essential validity, should not be and has not been extended to such unreasonable limits.

Dicta in a few jurisdictions suggest the thought that the claim of a defrauded stockholder should rank equally with claims which antedated the stock purchase induced by fraud, but should be subordinate to claims and deposits made subsequent to such purchase. The reason advanced for such inferior ranking is that subsequent creditors advance money or make deposits on the strength of and in reliance upon capital contributed through the stock purchase, and should be protected in their reliance. See *Birmingham* v. *Burke*, 67 Utah 90. This reasoning is not persuasive and is thoroughly unrealistic. The existence of such reliance is in fact highly doubtful. Granted there is reliance, what is the justifiable extent thereof? A subsequent creditor may conceivably have a right to rely on the fact that the capital has been or will be contributed; but that reliance is not defeated here, since the capital was in fact contributed when the stock was initially issued and paid in—long before the plaintiff was fraudulently induced to purchase it. Certainly the creditor is not justified in relying upon the assumption that a stockholder does not have an enforceable claim against the corporation; nor can he in good conscience seek to benefit by a fraud practiced upon another creditor (depositor). The defrauded depositor is not attempting to assert a priority as against other creditors; he merely asserts a claim equal in rank to other unsecured claims, and, on the plainest conceptions of fair dealing, is entitled to it.

The defendant Bank has cited three English cases (Cross-pet., p. 13, ff.) as common law support for the extreme position that there is *no* right to rescind a stock purchase for fraud after insolvency of the corporation, even in the absence of laches or estoppel, of which the plaintiff was concededly innocent in this case (R. 115). It

is enough to say that the so-called English rule exemplified by these cases, whatever may be its true limits, has not been followed in this country (see in addition to authorities cited *supra*, cases collected in Notes, 41 A. L. R. 674, 689, ff.; 46 A. L. R. 484; 1936 Supp., p. 294) and the court below has specifically rejected it.* The English rule is dependent upon an historical and statutory background having no parallel in this country.** It is to be noted, moreover, that

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* The court said in *MacNamee* v. *Bankers' Union for Foreign C. & F., supra*, p. 617: "While the rule may be otherwise in England, in this country it is generally held that a defrauded shareholder may rescind after the insolvency of the corporation. *Newton Nat. Bank* v. *Newbegin*, 74 F. 135 (C. C. A. 8), 33 L. R. A. 727; *Florida, etc., Co.* v. *Merrill*, 52 F. 77 (C. C. A. 5); *Salter* v. *Williams*, 244 F. 126 (C. C. A. 3); *Ryan* v. *Mt. Vernon Bank*, 206 F. 452 (C. C. A. 2); *Brown* v. *Allebach* (C. C.) 166 F. 488, 495; *Gress* v. *Knight*, 135 Ga. 60, 68 S. E. 834, 31 L. R. A. (N. S.) 900; *Morrisey* v. *Williams*, 74 W. Va. 636, 82 S. E. 509, L. R. A. 1915D, 792."

** Originally members of English stock companies were jointly and severally liable for all obligations of the company and could be directly proceeded against by creditors. They were virtually partners and were frequently referred to as such. See historical discussion in *Oakes* v. *Turquand*, [1867] L. R. 2 H. L. 325. Accordingly a member could no more rescind his purchase of stock after insolvency and put in a claim on a par with creditors than could a partner, after insolvency of the partnership, put in a claim against the estate on the ground that he had been fraudulently induced to become a partner. By the Companies Act, 1862, a more formal method of "winding-up" stock companies was adopted, the responsibility of members to satisfy company liabilities being made enforceable on behalf of creditors by liquidators' "calls". Moreover the responsibility of members for company liabilities could be limited by appropriate specification in the Memorandum of Association. Companies were thereafter divided into: "unlimited companies"—no limit on members' responsibility for calls; "companies limited by shares"—members' responsibility limited to amounts unpaid on their shares (shares being originally issued at less than par); "companies limited by guarantie"—member's responsibility limited to stated amounts specified in the Memorandum. It was soon held that the Act of 1862, while in some cases limiting the amount of the responsibility of members, did not alter the essential nature of their relations *inter se* or toward creditors.

English cases have not gone to the extent claimed by the defendant. In *East Broken Hills Consols, Ltd.* v. *Mallaby-Deeley*, 11 T. L. R. 241 (Q. B. Div.), *aff'd*, *id.*, p. 465 (Ct. App.), and *In re Hull & County Bank*, 15 Ch. Div. 507, cited by the defendant (Cross-pet., pp. 16-17), the members were attempting to resist payment of a call or the original subscription price in suits therefor brought by the liquidators. See also, *Oakes* v. *Turquand*, [1867] L. R. 2 H. L. 325; *Kent* v. *Freehold Land & Brick-Making Co.*, [1868] L. R. 3 Ch. 493; *Stone* v. *City & County Bank, Ltd.*, [1877] L. R. 3 C. P. Div. 282, 289. In *Houldsworth* v. *City of Glasgow Bank and Liquidators*, 5 App. Cas. 317 (Cross-pet., pp. 13-16), the member was not attempting to rescind but was asserting a claim among other things to be paid in full for calls which he had theretofore paid and anticipated calls. It is to be further observed that the company involved was "unlimited," *i. e.*, members were jointly and severally liable, as partners, for all the liabilities of the company.

In sum, we submit that the prevailing rule permitting the diligent, defrauded stockholder to share equally, to the extent of his judgment for the fraud, in the assets of an insolvent corporation, is founded upon cogent grounds of reason and equity. A claim based upon the corporation's fraud arose at the time of purchase prior to the insolvency; like any other defrauded person, the stockholder is entitled to equal redress. Though a stockholder, the plaintiff was

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Oakes v. *Turquand*, *supra*. They remained "partners," though in a qualified sense, and were said to have no right to rescind after a formal winding-up of the company. But, as noted in the text, English cases have not actually gone to this extreme.

For obvious reasons, American courts have not followed the English decisions. Stockholders in American corporations cannot be regarded as "partners" or joint-venturers.

not engaged in active management or control of the corporation, and any vague solicitude for creditors as opposed to stockholders does not warrant a subordination of plaintiff's claim merely because he happens to be a stockholder as well as a defrauded depositor. The strength of his position is certainly equal to that of other creditors.

(2) *The effect of the statute respecting National Bank shareholders' liability for assessment.*

Impliedly agreeing that there was no basis for its decision at common law or in the reason of the case apart from special statute, the court below rested its decision on a purported "implication" from 12 U. S. C., Section 63 (R. 116). All that this section says is that National Bank stockholders shall be held responsible "for all contracts, debts, and engagements" of the Bank, "to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." This liability, as the defendant concedes (Cross-pet., p. 12), is one which exists by virtue of this section and not otherwise. *Pufahl* v. *Parks*, ... U. S. ....., 81 L. Ed. *73; *Forrest* v. *Jack*, 294 U. S. 158, 162; *Christopher* v. *Norvell*, 201 U. S. 216, 225; *Page* v. *Jones*, 7 F. (2d) 541, 544 (C. C. A. 8). Being in derogation of the common law, the statute will not be construed to alter or affect pre-existing common law rights further than the clear import of the language used in the statute imperatively requires. *Texas & Pacific Railway* v. *Abilene Cotton Co.*, 204 U. S. 426, 437. Where, in the text of the section, or any reasonable implication therefrom, is there justification for the *further* and drastic disability that a claim for fraud as to the sale of stock, asserted through rescission after insolvency of the Bank,

shall be subordinated to other creditors' claims? Surely an extraordinary amount of prestidigitation is necessary in order to draw any such "implication" from the words of the statute.

The fallacy in the court's position is that it has ignored the dual relation which the plaintiff sustains to the Bank—his position as a stockholder whose name appears on the stock list at the time of the Bank's failure, and his position as a creditor of the Bank to the extent of the fraud practiced upon him. Separate and independent rights and obligations flow from each status and "his liabilities and duties in the one relation should not embarrass him in the enforcement of his rights in the other." *Richardson* v. *Olivier, supra*, p. 280. Recognition of this dual rôle played by the plaintiff is crucial to the proper solution of the issue at bar.

The court below cited cases under the statute in which defrauded stockholders who had not rescinded prior to insolvency were held unable to resist suits brought by the receiver to collect the statutory assessment,* and argued from them that a defrauded stockholder cannot "reduce the amount he has paid as assessment" (R. 116). The liability of a defrauded stockholder to meet the assessment is not disputed. That flows from the terms of the statute: "stockholder" means stockholder at the date of receivership (see Section 64); at least where the fraud does not render the sale void, but merely voidable, the stockholder *is* such when the Bank fails and is therefore obliged to make good the assessment. See *Lantry* v. *Wallace*, 182 U. S. 536, 551; *Ryan* v. *Mt. Vernon National Bank*, 224 Fed. 429, 430

* *Scott* v. *Deweese*, 181 U. S. 202; *Anderson* v. *Cronkleton*, 32 F. (2d) 170 (C. C. A. 8); and *Lantry* and *Ryan* cases, *infra*.

(C. C. A. 2); *B. V. Emery & Co.* v. *Wilkinson*, 72 F. (2d) 10, 13 (C. C. A. 10). But these cases are wholly inapplicable here, since the plaintiff has not sought to avoid or to "reduce" the statutory obligation resting upon him as stockholder. To the contrary, he has honored that obligation by paying the full assessment levied against him. Having paid such assessment he is now asserting his independent rights as creditor and may file a claim and receive dividends on his claim. As to his present deposit balance in the Bank, the plaintiff can concededly do this; the only effect of a favorable decision herein will be to permit him to receive dividends on his true deposit balance—*i.e.*, the present balance plus the amount withdrawn from the account as a result of the Bank's fraud.

After reciting the rule that defrauded stockholders must, under the statute, pay the assessment, the lower court stated that by "necessary implication" both the fund raised by the assessment and all the assets of the Bank at the date of insolvency are "security for the payment of *those who were creditors at the time of the bank's failure*" and that the defrauded stockholder cannot "come in to share the assets he is bound to leave to the prior satisfaction of those creditors" (R. 116). But the words "*creditors at the time of the bank's failure*" conceal an essential ambiguity; they point the very error in the court's analysis. Why is not a defrauded shareholder a "creditor at the time of the bank's failure" to the extent of the fraud which antedated the Bank's failure?

There is nothing in the statute that purports to affect or alter the common law rights which a defrauded stockholder has in his separate and independent capacity as creditor. It merely defines the obligations of a stockholder

appearing on the stock list by imposing a liability which does not exist at common law; and to that extent the common law rule is altered. The plaintiff has paid that assessment. In all other respects the rights and legal relations obtaining at common law are left unaffected. As creditor by virtue of the fraud the plaintiff is entitled to the same rights as any other unsecured creditor.

So far as creditors' general reliance on the statute is concerned, it may be said that the statute justifies reliance on the fact that each share on the stock list is liable for assessment. But, as we have seen, the plaintiff has actually paid the stock assessment; and neither creditors nor other shareholders have cause to believe or to rely on the supposition that the plaintiff does not have a valid claim, *qua* creditor, against the receivership. Conceivably also, the statute reenforces the creditors' reliance on the fact that the stock list represents paid-in shares constituting the initial capital of the Bank. But as shown above, since the capital of the Bank was in fact contributed long before the present controversy arose—a point to which the court below did not even advert—no creditor is defeated in this reliance.

Our contention that the plaintiff is both a creditor and stockholder of the Bank and that his rights as creditor are in no way affected or subordinated by the Bank assessment statute, either expressly or by necessary implication, finds support in every other circuit presented with this question. Such decision has been reached in two types of cases: (a) those represented by *Richardson* v. *Olivier*, *supra* (C. C. A. 5), in which the claim of the National Bank stockholder was not based upon fraud inducing the sale of Bank stock, but upon fraud affecting some other trans-

action (or was based upon some other delict or contract obligation); (b) those represented by *Salter* v. *Williams, supra* (C. C. A. 3), which is directly in point, where the claim of the National Bank stockholder was based upon fraud inducing the sale of Bank stock.

Richardson v. *Olivier.*

Olivier, a shareholder in a National Bank, deposited a check with the Bank at a time when the institution was insolvent and known to be so by its officers. After paying the assessment *qua* stockholder, the stockholding-depositor instituted suit against the receiver to recover the proceeds of the check on the ground that the deposit was procured by fraud. One of the defenses interposed by the receiver was that the plaintiff was a stockholder of the Bank. In overruling this contention the court stated (105 Fed., p. 280):

> "The statute fixes certain liabilities on the shareholders of national banks. They are made responsible for the contracts of the bank to the amount of their stock therein at its par value, in addition to the amount invested in such shares. Rev. St. §5151. • • • When a shareholder makes a general deposit in the bank, the bank becomes his debtor, as in the case of deposits by non-shareholders. When he makes a special deposit, the relation of trust arises, as in the case of special deposits by others. There is no sound reason, we think, for refusing to give a shareholder the same remedies against the bank on account of its frauds that are given to other creditors. *The shareholder who is a creditor occupies a dual relation to the bank, and his liabilities and duties in the one relation should not embarrass him in the enforcement of his rights in the other.* • • • To deprive him of the

> rights and remedies of others would be to add to the responsibilities and liabilities imposed on him by the act of Congress under which the banks are organized." (Italics ours.)

See also *Duffy* v. *Treide, supra; Bryan* v. *Welch, supra,* pp. 970, 971.

Salter v. *Williams and like cases.*

In this case the First National Bank of Bayonne by its president had fraudulently induced the sale of its own paid-in stock. After the insolvency of the Bank and the appointment of a receiver plaintiff rescinded the contract and initially sought to avoid the stockholder's assessment imposed by the Comptroller of the Currency. The court properly held that the plaintiff was liable for the assessment within the provisions of the Federal statute (219 Fed. 1017 [D. N. J.]). Thereafter the question arose whether the plaintiff was entitled to a judgment against the Bank deriving from the fraud and whether such judgment could share equally with the claims of other unsecured creditors. The Circuit Court of Appeals for the Third Circuit held that the Bank was chargeable with the fraud of the president and then, noting that the plaintiff had satisfied his liability under the shareholders' assessment statute, held that, *qua* creditor, the plaintiff was entitled to parity with other creditors (244 Fed., p. 130):

> "That Salter could have enforced a right of rescission against the bank (if such he had) before the appointment of a receiver is unquestioned. If so, it would be only because the rights of creditors were then no greater than his right of rescission. If creditors' rights in the capital were no greater than

Salter's before the appointment of a receiver, they surely are no greater after. The rights of both with respect to capital are fixed by law, not by a change from solvency to insolvency of the bank, and by the consequent appointment of a receiver.

"Salter's right to rescission was fixed by the fraud of the bank when the fraud was practiced. That was before receivership. He therefore approaches the receiver like an ordinary creditor whose claim was contracted before receivership, with a like right to redress out of the bank's funds in the hands of the receiver." (Italics ours.)

The court's discussion of the effect of the shareholders' liability statute is especially noteworthy, as it acutely refutes the reasoning of court below (pp. 129-30):

"• • • It [the receiver's contention] is based upon the theory that the stock of a bank represents its capital; that creditors have a right to look to its capital for the payment of its debts; that their rights are fixed by the appointment of a receiver, which preserves the capital for them undisturbed by stockholders seeking to get from under the legal liability of their stock ownership. In support of this very general proposition no authorities are cited. The argument in support of it is made by analogy to certain undisputed principles affecting the liability of stockholders and the rights of creditors upon insolvency of a national bank and the appointment of a receiver. These apply to the double liability of a stockholder of a national bank under section 5151, R. S., and to the liability of a subscriber to stock in a national bank to complete his contract of subscription. *Scott* v. *Deweese*, 181 U. S. 202, 21 Sup. Ct. 585, 45 L. Ed. 822; *Scott* v. *Abbott*, 160 Fed. 573, 87 C. C. A. 475; *Lyons* v. *Westwater*, 181 Fed. 681, 104

C. C. A. 663; *Westwater* v. *Lyons*, 193 Fed. 817, 113 C. C. A. 617. It is to this double liability of the holder of full-paid shares and to the contractual liability of a subscriber to fully pay for his shares that creditors have a right to look for the payment of the bank's debts. But neither of these principles applies in favor of creditors and against Salter in this case, for Salter has met his liability under Section 5151 by paying his assessment and disclaiming an intention to sue for its recovery, and he is not liable for an uncompleted contract of subscription, because the stock he purchased had previously been subscribed and fully paid. It is to that money which shares of stock produce as capital when they are subscribed and paid for that creditors have a right to look, not to the money which Salter thereafter paid the bank in buying its stock. If the purchase price of full-paid stock is treated, not as assets, but as capital, there would be a curious oversubscription of the bank's capital, in which each of Salter's shares would have contributed $300, $100 upon subscription, and $200 upon Salter's later purchase. This, of course, is impossible.'"*

Analysis of the authorities indicates that the First, Fourth and Fifth Circuits have sided with the view of the Circuit Court of Appeals for the Third Circuit as set forth in the *Salter* case, and that there is no decided case to the contrary as respects National Banks (except for the decision herein).

Very recently, the Circuit Court of Appeals for the First Circuit, in *Clark* v. *Boston-Continental National Bank* (two cases), *supra*, both decided June 25, 1936, adhered to the

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* In the case at bar the par amount of the stock was $100 each; the plaintiff paid $1,512 for each share.

rule laid down in the *Salter* case. Following insolvency of the National Bank and the appointment of a receiver, Clark brought two actions in fraud and deceit against the Bank, charging that the Bank president, acting for the Bank, had made certain false and fraudulent representations as a result of which Clark was induced to purchase Bank stock (and also to lend money upon the security of Bank stock owned by third parties). As in the case at bar, the purpose of the fraud was to rig the price of Bank stock at an artificially high level in excess of true value. "Two questions," said the court, "are raised in this case: (1) whether a corporation may be held for the false representations made by its directors or under their authority; and (2) *whether, if it may be held liable therefor, the plaintiffs, as judgment creditors of an insolvent bank, having paid the assessments levied against them as stockholders, may participate ratably with other creditors in a distribution of the assets of the bank in the hands of the receiver.*" (Italics ours.) The court answered both questions in the affirmative. On the second question, which is the one here in issue, the court stated (84 F. [2d], p. 607):

> "As to the second question it appears from the allegations of the declaration that the plaintiffs' claims were fixed liabilities of the bank at the time it was declared insolvent, and that the plaintiffs have paid the assessments levied against them as stockholders. In this situation we see no reason why the plaintiffs should not participate ratably with other creditors in the distribution of the bank's assets in the hands of the receiver. It was so held in *Salter* v. *Williams* (C. C. A.) 244 F. 126."

In *Williams* v. *Green, supra* (C. C. A. 4), the *Salter* case is also approved and followed, the distinction between

rescission of a subscription to an original issuance of National Bank stock, and rescission of a sale of Bank stock previously issued and paid in, being carefully suggested.

The Circuit Court of Appeals for the Fifth Circuit in *Florida Land & Imp. Co.* v. *Merrill,* and *Merrill* v. *Florida Land & Imp. Co., supra,* decided before the *Salter* case, also permitted a defrauded purchaser of issued and paid-in stock to assert the normal rights of a creditor to the extent of the fraud. The *Merrill* cases are explained and approved in *Julian* v. *Stewart, supra* (C. C. A. 5).

It is respectfully submitted that the reasoning of the *Salter* case and cases approving and following it is sound in logic and principle and that the decision herein, far from being a "necessary implication" from the terms of the statute, represents a wholly unwarranted inference therefrom. If allowed to stand, the decision will tend to impose a curious additional disability on stockholders of National Banks which the Congress nowhere directed to be imposed. As it has been repeatedly recognized that the liability of Section 63 is purely a statutory liability (see *supra,* p. 21), something more than a vague and unfounded solicitude for creditors-who-are-not-also-stockholders (as distinguished from creditors-who-happen-also-to-be-stockholders) is needed before a disability is imposed beyond the plain terms of the section.

B. In defendant's own view of the facts, *i. e.*, that the sale to the plaintiff was of stock actually owned by a third party, the Bank acting merely as an agent in the transaction, plaintiff's judgment is plainly entitled to equal ranking.

Defendant has consistently maintained that the stock purchased by the plaintiff herein was not only previously issued and paid-in but indeed belonged to a third party, the securities affiliate, at the time of the sale to the plaintiff, and that the defendant Bank acted as an agent for the affiliate in the transaction. On this state of facts there is no conceivable reason why plaintiff should not have a claim against the receivership on a par with those of other general creditors. Neither the "trust fund" nor "reliance" arguments, nor the assessment statute nor any implication therefrom, advanced with respect to a sale by a banking corporation of stock which it owns, has relevance in a case where the capital stock has not only been fully paid-in but is owned by an independent third party and is sold by the corporation merely as agent for that party. This distinction is marked and observed in the cases. See *Williams* v. *Green, supra*, p. 797; *Julian* v. *Stewart, supra*, p. 34; *Litchfield Bank* v. *Peck, supra*. So far as the Bank, its creditors and other stockholders are concerned, the case is the same as if the Bank perpetrated a fraud in selling a share of American Telephone and Telegraph stock or an Atchison, Topeka and Santa Fe bond or some other chattel as agent for a third party. There is no more reason for depriving plaintiff of equal treatment herein than there would be if the claim arose out of a contract or delict wholly unrelated to Bank stock.

POINT II.

Assuming that where rescission is effected subsequent to "insolvency" the judgment thereon must be subordinated, that rule does not apply to the case at bar. The rescission and institution of the present action occurred months prior to the finding and declaration of insolvency by the Comptroller of the Currency. It is the date when such finding and declaration were made (and not the date when the Bank became unable to meet its obligations as they matured) that is controlling.

In this Point we assume *arguendo* that, in the ordinary case, where rescission of a stock purchase is effected after insolvency of the banking corporation, subordination of the claimant's judgment thereon is proper. It is here urged that that proposition has no applicability to the case at bar because the plaintiff effected the rescission and instituted suit thereon months before the Comptroller of the Currency declared the Bank to be insolvent and appointed a receiver. *It is submitted that it is only the date of such official finding and declaration of insolvency that is material.*

When the action was commenced no declaration of insolvency had been made and no receiver had been appointed. When the answer and amended answer were interposed the situation was still the same, and no allegation of insolvency was contained in either pleading. It was not until the trial that the defendants attempted to raise any contention concerning insolvency.

At the opening of the trial the defendants moved to amend their answer further by setting up that "At all times since on or about March 4, 1933, the defendant, [Bank], has been and now is insolvent" (R. 9). This motion to amend was opposed by the plaintiff (R. 8); the District Court allowed the amendment "tentatively" but never ruled upon it (R. 112) and did not consider the effect of insolvency. In the course of the trial, the plaintiff, reserving its objection to the materiality and sufficiency of the "tentative" amendment, conceded that the Bank was unable to meet its obligations as they matured on March 3, 1933 (R. 34, 38, 122-3). It was not proved, however, and cannot be assumed that the plaintiff had knowledge of this fact. The tender and demand, constituting the executed rescission herein, occurred on May 6, 1933, and suit was actually instituted on May 31, 1933. A conservator had been appointed for the Bank on March 13, 1933,* but a receiver was not appointed until October 16, 1933 (R. 39; Cross-pet., p. 2), and it was on that date that the Comptroller of the Currency officially declared the Bank insolvent (R. 122-3).

It is submitted that the fact that the Bank became unable to meet its obligations as they matured prior to the time of the rescission is not determinative. Rights in re-

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* A conservator may be appointed "whenever [the Comptroller] shall deem it necessary in order to conserve the assets of any bank for the benefit of the depositors and other creditors thereof, * * *." 12 U. S. C., Section 203. Insolvency is not a condition necessary for the appointment. While the conservator is vested with the powers of a receiver so far as consistent with his status as a conservator (*id.*), his status is an interim one which may be, and frequently is, followed by returning the Bank to its board of directors. After the "banking holiday" of March, 1933, nation-wide publicity was indeed given to the fact that the mere appointment of a conservator did not mean that a Bank had failed.

spect to National Banks are fixed and determined not by reference to a date when the Bank was insolvent as that fact may be subsequently disclosed, but by the date of the declaration and finding of insolvency by the Comptroller of the Currency, who is charged by statute with the duty of making such a finding. *Merrill* v. *National Bank of Jacksonville,* 173 U. S. 131, 143; *Scott* v. *Armstrong, supra; Yardley* v. *Philler,* 167 U. S. 344; *American S. Co.* v. *De Carle,* 25 F. (2d) 18, 19 (C. C. A. 9). Referring to Rev. Stat., Section 5236 (now 12 U. S. C., Section 194), which exclusively governs distribution of assets in the receivership of National Banks (*Cook County Nat. Bank* v. *United States,* 107 U. S. 445), this Court, adverting to its earlier decision in *White* v. *Knox,* 111 U. S. 784, said, "The distribution is to be 'ratable' on the claims as proved or adjudicated, that is, on one rule of proportion applicable to all alike. In order to be 'ratable' the claims must manifestly be estimated as of the same point of time, and that date has been adjudged to be *the date of the declaration of insolvency.*" *Merrill* v. *National Bank of Jacksonville, supra,* p. 143. (Italics ours.) Manifestly, this is the only reasonable rule. "It is a matter of common knowledge that banks and other corporations continue, in many instances, to do their regular and ordinary business for long periods, though in a condition of actual insolvency, *as disclosed by subsequent events.*" *McDonald* v. *Chemical National Bank,* 174 U. S. 610, 618. (Italics ours.) Until the declaration of insolvency by the Comptroller of the Currency, the fact of insolvency is unknown to the public.

Moreover, subsequent events may and often do occur which alter the original condition and render the existence of insolvency at the earlier date immaterial. Unlike stat-

utes of certain States which make it mandatory to close a Bank when insolvency appears, the Federal statute leaves it to the Comptroller of the Currency to determine whether affirmative action should be taken. Section 191 (12 U. S. C.) thus provides:

> "• • • whenever the comptroller shall become satisfied of the insolvency of a national banking association, he *may*, after due examination of its affairs, • • • appoint a receiver who shall proceed to close up such association, • • •" (Italics ours.)

The policy of the statute is to leave to the Comptroller's discretion not only the question of whether the Bank is insolvent but also whether under the circumstances it is for the best interest of all concerned to close the Bank forthwith or to permit it to remain open. In *Easton* v. *Iowa*, 188 U. S. 220, 232, this Court said:

> "Whether a bank is or is not actually insolvent may be, often, a question hard to answer. There may be good reason to believe that, though temporarily embarrassed, the bank's affairs may take a fortunate turn. Some of the assets that cannot at once be converted into money may be of a character to justify the expectation that, if actual and open insolvency be avoided, they may be ultimately collectible, and thus the ruin of the bank and its creditors be prevented. • • • In such a case the provisions of the federal statute would permit the Comptroller to withhold closing the bank, and to give an opportunity to escape final insolvency. It would seem that such an exercise of discretion on the part of the Comptroller would, in many cases, be better for all concerned than the unyielding course of action prescribed by the state law."

In the case of the defendant Bank the Comptroller actually did exercise his discretion by not closing the Bank when its insolvency was first known to him. In *O'Connor* v. *Bankers Trust Co.*, 159 N. Y. Misc. 920, where the Comptroller sued certain member Banks of the New York Clearing House Association (R. 38, 116, 123), it appeared that, although it was known only to the Comptroller and a few others, the defendant Bank was actually insolvent in May 1932 (p. 925), but because of assurances claimed to have been made by the defendant Banks, and because of the disastrous consequences which might have resulted at that critical time had he then closed the Bank, the Comptroller in his discretion refrained from doing so (p. 926). This disposition by the Comptroller, apparently fully justified in the light of the then existing facts, kept the Bank open as a going concern for many months after insolvency was known to him. This exercise of his discretion could have been justified only by his belief that subsequent events would solve the problem of the Bank's then condition of apparent insolvency.

Surely there is no rule, nor the basis for any rule, which would make such an undisclosed condition focal in determining the rights of a person defrauded by the Bank. The determining date can only be the date on which a definite, authoritative act occurs, indicating what this Court has called "final insolvency."

Independently, therefore, of the contentions made in Point I, *supra*, it is submitted that the plaintiff's judgment is entitled to share equally in the receivership estate.

POINT III.

Plaintiff is a defrauded *depositor*. The merits of his case are equal to those of other depositors and general creditors.

As a final argument supporting our position that the plaintiff's judgment is entitled to equal ranking, we lay renewed emphasis upon the fact that the plaintiff herein was and still is a depositor in the Bank. At the time of the fraud he had $30,000 in his Bank account (R. 26); he was fraudulently induced to diminish this balance by more than $15,000; he continued as a depositor in the Bank, having a balance of about $6,700 when the Bank failed (*id.*). In this action he seeks to be restored to the position he occupied before the fraud and to share equally with his fellow depositors in the receivership estate to the extent of his present deposit balance plus the amount (less proper offsets) of which he was swindled. He seeks only restoration of status as a depositor, having stated in rescinding, "I demand that my deposit account be credited with the sum of $12,187.00," *etc.* (R. 52). Whatever objection there may be to permitting a defrauded stockholder to convert himself into a creditor on proof of fraud, cannot apply where the attempt is merely to reinstate a depositor-creditor in his position as such. The subordinated judgment entered by the court below permits other depositors in the Bank to take the benefit of a fraud perpetrated on one of their fellows. Considerations of fairness dictate a contrary result.

POINT IV.

In refutation of the contentions of the defendant Bank, as cross-petitioner in No. 670.

The contentions that the plaintiff may not recover any judgment against the defendant Bank upon the grounds

(a) That the National Banking Act (12 U. S. C., Section 63) forbids the application of the fund raised by assessment of shareholders to the payment of non-contract claims (from which it is supposed to follow that there is no source out of which such claims may properly be satisfied);

(b) That the Act (12 U. S. C., Section 24 (7), and Sections 83, 56 and 59) absolutely prohibits rescission of stock purchases as against solvent and insolvent Banks;

(c) That the defendant Bank is not chargeable with the fraudulent representations of its officers in connection with the sale,

are plainly erroneous.

A.

The defendant Bank advances the following argument (Cross-pet., pp. 18-21): Section 63 imposes a limited assessment liability on stockholders (declared by the Comptroller and enforced by the receiver) for all "contracts, debts, and engagements" of the Bank; a claim such as the present, deriving from fraud of the Bank, is not a contract, debt or engagement; hence the plaintiff is not entitled to participate in the fund raised by the stock assessment, and therefore, presumably, is not entitled to any judgment whatever.

The effect of the defendant's argument, as it virtually concedes (Cross-pet., pp. 18-21), would be that no claim, other than one arising out of a contract, debt, or engagement, as thus narrowly defined, could be asserted against a National Bank in receivership,—even if such claim was established long prior to the insolvency of the Bank and even if it arose out of a transaction having nothing to do with Bank stock. For, the defendant argues, if the claim does not arise from a contract, debt or engagement of the Bank, the Comptroller may not predicate any part of the assessment thereon; therefore the claim may not share in the fund raised by assessment; therefore it may not share in that fund *or* in the remaining assets of the Bank. A mere statement of the far-reaching consequences of defendant's reasoning shows its basic invalidity.

The argument is wholly fallacious for several other reasons.

(i) If it be assumed, as the defendant argues, that the Comptroller of the Currency may not predicate the assessment in part or in whole upon an outstanding fraud liability (or other non-contract obligation of the Bank), his doing so would merely afford stockholders a possible partial or complete defense to the suit for the assessment. The assessment is now presumed valid and is conclusive and immune from collateral attack. *Studebaker* v. *Perry*, 184 U. S. 258. And no reason suggests itself why the fund, having been *properly* raised by assessment, may not now be used (together with the remaining assets of the Bank) to pay fraud liabilities as well as other non-contract and contract obligations of the Bank.

In the present case it would make no difference to stockholders whether the plaintiff's claim is allowed to share on

a parity with the claims of other creditors. The Comptroller has made an assessment upon stockholders for the full amount (R. 38-39). Obviously he did not base this upon the plaintiff's claim but made the assessment because the assets on hand were insufficient to meet the Bank's "contracts, debts, and engagements" at least to the amount sought by the assessment. Hence it does not cost the stockholders one additional dollar if the fund raised by assessment is used in part to pay a fraud or other non-contract liability of the Bank.*

(ii) Again, even if the fund actually raised by assessment can be devoted only toward payment of contracts, debts and engagements of the Bank and even if a claim deriving from fraud of the Bank is held not to fall within this category, the effect would be merely to debar the plaintiff from sharing in *that* specific assessment fund. He would nevertheless be entitled to rescind and share in the assets of the Bank apart from the fund raised by assessment. The defendant does not advance any reason whatsoever why this latter source of payment is not available for non-contract claims.

(iii) Taken in this qualified sense, the defendant's argument would result in creating two separate funds upon in-

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* Recognizing the inherent weakness in the argument now under consideration and that it is unsupported by the authorities in this country, the defendant Bank has cited English authority (Cross-pet., pp. 13-15) for the proposition that a defrauded shareholder may not seek reimbursement *from other shareholders*. Enough has been said about the English law to show its utter inapplicability to the situation at bar (*supra*, pp. 18-20).

solvency; first, the fund raised by assessment,* against which there could not be asserted any non-contract claim; second, the remaining assets of the Bank, against which all varieties of claims could be asserted. These peculiar notions of distribution are not supported by the National Banking Act, which manifests a clear intent that the fund raised by assessment and all the remaining assets of the Bank shall, upon insolvency, be subjected to all valid claims, whether *ex contractu* or *quasi ex contractu* (see 12 U. S. C., Sections 192 and 194; *King* v. *Armstrong,* 50 Ohio St. 222); nor, it may be confidently stated, are they followed in the actual administration of insolvent National Banks.**

(iv) Finally, it has in fact been repeatedly held that claims for money had and received (such as the plaintiff's claim herein upon the executed rescission, which lies in *indebitatus assumpsit*) may share equally with other unsecured creditors' claims in *both the fund raised by the assessment and the remaining assets of the Bank,* familiar instances being *Aldrich* v. *Chemical National Bank,* 176 U. S. 618 (see Transcript of Record, pp. 275-6, 277); *Rankin* v. *Emigh,* 218 U. S. 27, 35-6; see also *Case* v. *Citizens' Bank,* 100 U. S. 446; *Stanton* v. *Wilkenson,* Fed. Cas. No. 13,299

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* The argument might well apply also to the capital of the Bank, since Section 63 also contains the phrase "in addition to the amount invested in such shares."

** In his public reports relating to receiverships of National Banks the Comptroller of the Currency uniformly lists the fund raised by stock assessment as a collection and shows disbursements against the sum total collected from all sources including the fund raised by assessment. There is no indication of any separate accounting with respect to the fund raised by assessment. See, *e.g.,* SEVENTY-FOURTH ANNUAL REPORT OF THE COMPTROLLER OF THE CURRENCY (Treas. Dept. Doc., 1937), pp. 26-41.

(S. D. N. Y.); *Bereth* v. *Sparks*, 51 F. (2d) 441, 442-3 (C. C. A. 7); *Turner* v. *First National Bank*, 26 Iowa 562.*

B.

The defendant Bank contends (Cross-pet., pp. 26-27) that rescission should be entirely disallowed by reference to 12 U. S. C., Section 24 (7) (as amended February 25, 1927, c. 191, Section 2, 44 Stat. 1226), which provides that buying and selling of bonds, notes or debentures, commonly known as investment securities, shall be limited to buying and selling "without recourse." Of this argument, sought to be supported by the citation of *Awotin* v. *Atlas Exchange Bank*, 295 U. S. 209, the court below properly said (R. 113-114):

> "• • • To say the least, it is highly doubtful whether this language can be stretched to include the purchase and sale of stock, and particularly of the bank's own stock. Compare the amendment of August 23, 1935, which uses the words 'securities and stock' (49 Stat. 709, §308 [12 U. S. C. A. §24]). But assuming that it can, the statute would still be inapplicable to the case at bar. The evil aimed at by the statute was the incurring of liability by the bank in consequence of an indorsement, guaranty, or re-

* The only authority cited (Cross-pet., p. 19) in support of the restricted definition of "contracts, debts, and engagements" is *Clinton Mining & Mineral Co.* v. *Beacom*, 266 Fed. 621 (C. C. A. 3), *cert. den.*, 254 U. S. 637. That case did not involve a construction of Section 63. Moreover, it was a suit by a creditor *to enforce* a statutory assessment, and neither said nor held anything as to how the fund actually raised by assessment should be distributed. The inappositeness of the *Clinton* case is shown by the fact that the same circuit, in *Salter* v. *Williams, supra*, held not only that a defrauded shareholder may rescind following insolvency, but that such claim ranks equally in distribution with the claims of other general creditors.

> purchase agreement with respect to securities it sold. *Awotin* v. *Atlas Exchange Bank,* 295 U. S. 209, 55 S. Ct. 674, 79 L. Ed. 1393. It had nothing to do with tort liability arising out of fraud; nor can it be construed to forbid incurring the liability imposed by law when a contract of sale, induced by fraud, is rescinded."

It should be added that the effect of defendant's argument, if sustained, would be to render impossible not only rescission of a fraudulent sale of Bank stock, but of virtually any security, and this whether rescission was attempted against a solvent or insolvent Bank. It would thus confer an immunity on National Banks against the consequences of its own fraud,—an indefensible result.

Equally strained and untenable is the argument (Cross-pet., pp. 21-26) that rescission of a Bank stock purchase for fraud is impliedly prohibited by 12 U. S. C., Sections 83, 56 and 59, providing that a National Bank may not purchase its own stock except to prevent loss upon a debt previously contracted, and may not withdraw or reduce its capital except by vote of two-thirds of its shareholders, approval of the Comptroller of the Currency, *etc.* This argument, if sustained, would also have the effect of rendering rescission for fraud impossible before as well as after insolvency of a National Bank. We think it plain, as the lower court held concerning Section 24 (7), that the sections now considered have nothing to do with liabilities imposed by law when a contract of sale induced by fraud is rescinded. No case has purported to apply these sections to such a situation. *Schechter* v. *Sherwin,* 81 F. (2d) 603 (C. C. A. 7), cited by the defendant Bank (Cross-pet., p. 24), is simply an instance of an attempted repudiation of a stock purchase before insolvency of the Bank,

held to be ineffectual because no fraud was found. See 81 F. (2d), at p. 605.

C.

The defendant Bank argues that the decision below is erroneous "because it imposes liability upon a national bank for the fraud of its officers in connection with the sale of the shares of its corporate stock which said shares were not sold from among its assets but were the property of another and it was not enriched by the transaction" (Cross-pet., p. 28).

Without rehearsing the evidence, it is enough to quote from the opinion below, which completely disposes of all phases of this contention.

As to the argument that the stock purchased by the plaintiff was not owned by the Bank but by its affiliate, Harriman Securities Corporation, prior to the sale, and that therefore the Bank could not be held liable, the lower court stated (R. 112-113, 114):

"The defendants' proof tended to show that the stock purchased by Oppenheimer was not owned by the bank but by its affiliate, Harriman Securities Corporation. The bank maintained in its bond department an account known as 'Harriman Securities Corporation Suspense Account,' in which were reflected purchases and sales of Harriman Bank stock made for the account of said affiliate. To the extent that the account was long of the stock it represented an indebtedness of the affiliate to the bank. Certificates of stock purchased for the suspense account were put in the name of one Kelly, not an employee of the bank, as nominee of the Securities Corporation. The ten shares sold to Oppenheimer stood in Kelly's name, and the suspense

account was credited with the sum received by the bank from Oppenheimer, less $100 retained by the bank as its commission on the sale. It is conceded, however, that Oppenheimer had no knowledge of any transactions between the bank and its affiliate and believed that he was dealing with the bank as a principal in his purchase of the stock. It is also conceded that a fraud was practised upon him by Harriman and Williamson, the dispute as to this being only whether the bank is chargeable with their fraud. • • •

"Much of the argument in the briefs is directed to the controverted question whether the bank, as a principal, sold its own stock, or, as an agent, sold stock owned by the Securities Corporation. We cannot see that this dispute is at all material here. In either event, the plaintiff dealt only with the bank; he had no knowledge that any third party was involved. If the bank sold stock belonging to its affiliate, as the defendants contend, it sold for an undisclosed principal and was itself a party to the contract. AMERICAN LAW INSTITUTE, RESTATEMENT OF AGENCY, §321. When an agent for an undisclosed principal induces a sale by fraud, he must account for the purchase price, if the contract is rescinded, even though he has paid it over to his principal. *Id.*, §341; *McClure* v. *Central Trust Co.*, 165 N. Y. 108, 58 N. E. 777, 53 L. R. A. 153. Therefore, whether the stock belonged to the bank or to the Securities Corporation, the fundamental issue is the same, namely, whether the fraudulent representations of Harriman and Williamson are attributable to the bank."

And as to the argument that the Bank's officers did not have apparent or actual authority to make the sale on behalf of the Bank (and thus the representations incidental thereto), the lower court stated (R. 114-115):

"Despite the defendants' contention to the contrary, we think it indubitably plain that these officers had apparent, if not actual, authority to make the sale on behalf of the bank. If the stock was property of the bank, its acquisition of it may have been *ultra vires*, for only in special circumstances may a bank purchase its own stock. 12 U. S. C. A. §83. Nevertheless a corporation may transfer title to property which it was *ultra vires* to acquire (*Lantry* v. *Wallace*, 182 U. S. 536, 553, 21 S. Ct. 878, 45 L. Ed. 1218); and the plaintiff is not charged with notice that its ownership was unlawful, since under some circumstances it could be lawfully acquired. *National Bank & Loan Co.* v. *Petrie*, 189 U. S. 423, 424, 23 S. Ct. 512, 47 L. Ed. 879. The sale appeared to be lawful, and the bank's president and vice president had apparent authority to represent it in negotiating such sale. If, on the other hand, the stock belonged to the Securities Corporation, these officers would have actual authority to cause the bank to make a sale as agent for the owner, whereby a commission was earned for the bank and the proceeds of the sale were applied to reduce the owner's indebtedness to the bank. Hence whichever the ownership of the stock, the officers who negotiated with the plaintiff had at least apparent authority to make the sale. If this be so, their representations incidental to the sale by the bank (either as principal or agent) are attributable to the bank, since the plaintiff had no notice that the representations were unauthorized. *Salter* v. *Williams*, 244 F. 126 (C. C. A. 3); AMERICAN LAW INSTITUTE, RESTATEMENT OF AGENCY, §§257, 258; 7 MICHIE, BANKS AND BANKING, §173."

If, as the lower court held and as the evidence conclusively shows, the sale (and thus the representations

incidental thereto) were within the actual or apparent authority of the Bank's officers and agents, the Bank is chargeable irrespective of whether it was "enriched" by reason of the fraud. This is familiar doctrine. This Court observed in *James-Dickinson Farm Mortgage Co.* v. *Harry*, 273 U. S. 119, 123:

> "If Dickinson, either personally or through agents, made knowingly false statements with intent that the plaintiff should act upon them, his liability • • • would not depend upon the receipt of any benefit by him." [Citing cases.]

See also, *National City Bank* v. *Carter*, 14 F. (2d) 940, 31 F. (2d) 25 (C. C. A. 6); *Wasmann* v. *City National Bank of Knoxville*, 52 F. (2d) 705 (C. C. A. 6); *First National Bank of Silverton* v. *Mercantile National Bank of Pueblo*, 273 Fed. 119 (C. C. A. 8); *Stewart* v. *Wright*, 147 Fed. 321 (C. C. A. 8); *L'Herbette* v. *Pittsfield National Bank*, 162 Mass. 137; *Eastin* v. *Bank of Harrisonville*, 213 Mo. App. 130; *Phillips* v. *Mercantile National Bank*, 140 N. Y. 556; *Doerstler* v. *First National Bank*, 82 Ore. 92.

If it be deemed material, however, it is plain that the fraud herein had its origin in an attempt to maintain the Bank as an apparently solvent institution, and actually resulted—by the tangible receipt by the Bank of a check drawn to its order—in that "enrichment" or "benefit" to the Bank which would suffice to fasten liability upon it by ratification even if its agents were not actually or apparently authorized to effect the sale and so to make representations in connection therewith.

The fraudulent sale to the plaintiff was one step in a scheme to maintain an artificial price for Harriman Bank stock by "rigging" the market. The value of the stock

was drastically declining and the Bank took steps to prevent this fact from becoming known to the public. Like other Bank stock, Harriman stock was unlisted and sold over the counter. The quotations appearing in the newspapers were obtained by telephoning the Unlisted Security Dealers Association and the Association of Bank Stock Dealers (R. 74). These Associations secured their quotations from certain dealers in Bank stock (R. 75). The dealers based the quotations which they furnished the Associations upon sales made by their houses (R. 64, 71, 75). The record shows that for a lengthy period of time the dealers made very few sales of Harriman Bank stock to persons other than the Bank (R. 63-70). By this method, the Bank was able to create a fictitious price which was widely published, and maintain an appearance of prosperity.

As part of the scheme, it was of course necessary for the Bank to unload the stock which it had thus purchased; otherwise it would soon deplete its own resources. This it did by inducing certain of its depositors to buy Bank stock, by reference to the deceptive market quotations and by other fraudulent representations. The record shows that the ten shares sold to the plaintiff were transferred to him from stock acquired by Kelly (R. 75-6), a dummy, in whose name title was taken to stock purchased from time to time by the Bank from specialists (R. 76-81). Vice-president Williamson lied when he told the plaintiff that the stock came "from an estate."

The Bank stock in the name of the dummy Kelly, from which the sale to the plaintiff was made, was entered in a "suspense account" entitled Harriman Bank "in account with Harriman Securities Corporation" (shown in part at

R. 103-5), physically in the possession of the Bank. During the life of the account the affiliate was indebted to the Bank and the Bank had a lien for any indebtedness of the affiliate to it upon any property of the affiliate in the Bank's possession (R. 33-4). As the account acquired Bank stock —it dealt solely in that stock—the "debit balance" of the account in favor of the Bank was increased (R. 103-5); as the account disposed of shares, the Bank was repaid to that extent and the debit balance was thereby reduced (*id.*; R. 33).

Assuming that this "suspense account" was a simple agency (or "brokerage") account between the Bank and an independent third party, the Securities Corporation, as the defendant contends, the situation was as follows:

The plaintiff paid for his stock by a check drawn to the order of Harriman National Bank (R. 49). The check was received by the Bank, marked paid with the initials of the Bank, and not further endorsed (*id.*) Thus it is clear that the Bank actually received the money and retained it. It is certainly no part of the plaintiff's case to inquire what happened to the money after it was received by the Bank and receipted for. But if further inquiry be made and the defendant's view of the inter-corporate accounting between the Bank and its affiliate be adopted, we find merely that the fund, less "commissions," which were wholly retained by the Bank (R. 33), was credited to the Securities Corporation to reduce its outstanding indebtedness to the Bank. The suspense account had a "long" position, *i.e.*, showed a "debit" balance in favor of the Bank. The amount received by the Bank (less "commissions") was credited to the Securities Corporation in the account, the "debit balance" was reduced, as a payment

was drastically declining and the Bank took steps to prevent this fact from becoming known to the public. Like other Bank stock, Harriman stock was unlisted and sold over the counter. The quotations appearing in the newspapers were obtained by telephoning the Unlisted Security Dealers Association and the Association of Bank Stock Dealers (R. 74). These Associations secured their quotations from certain dealers in Bank stock (R. 75). The dealers based the quotations which they furnished the Associations upon sales made by their houses (R. 64, 71, 75). The record shows that for a lengthy period of time the dealers made very few sales of Harriman Bank stock to persons other than the Bank (R. 63-70). By this method, the Bank was able to create a fictitious price which was widely published, and maintain an appearance of prosperity.

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R. 103-5), physically in the possession of the Bank. During the life of the account the affiliate was indebted to the Bank and the Bank had a lien for any indebtedness of the affiliate to it upon any property of the affiliate in the Bank's possession (R. 33-4). As the account acquired Bank stock —it dealt solely in that stock—the "debit balance" of the account in favor of the Bank was increased (R. 103-5); as the account disposed of shares, the Bank was repaid to that extent and the debit balance was thereby reduced (*id.*; R. 33).

Assuming that this "suspense account" was a simple agency (or "brokerage") account between the Bank and an independent third party, the Securities Corporation, as the defendant contends, the situation was as follows:

The plaintiff paid for his stock by a check drawn to the order of Harriman National Bank (R. 49). The check was received by the Bank, marked paid with the initials of the Bank, and not further endorsed (*id.*) Thus it is clear that the Bank actually received the money and retained it. It is certainly no part of the plaintiff's case to inquire what happened to the money after it was received by the Bank and receipted for. But if further inquiry be made and the defendant's view of the inter-corporate accounting between the Bank and its affiliate be adopted, we find merely that the fund, less "commissions," which were wholly retained by the Bank (R. 33), was credited to the Securities Corporation to reduce its outstanding indebtedness to the Bank. The suspense account had a "long" position, *i.e.*, showed a "debit" balance in favor of the Bank. The amount received by the Bank (less "commissions") was credited to the Securities Corporation in the account, the "debit balance" was reduced, as a payment

by the Securities Corporation to the Bank. The "benefit" to the Bank is, then, perfectly clear. By virtue of the sale the Bank was able to reduce the alleged indebtedness running between the Securities Corporation and itself. It is as if *A* is indebted to *B* and engages *B* to sell his property with the understanding that *B* shall retain the sale price and credit *A* with that amount. When *B* effects the sale and makes the credit he is as much benefited as if he received the money for a sale of his own property. Similar circumstances were present in *Salter* v. *Williams, supra,* and the Bank was held liable. See also, *American Surety Co. of New York* v. *Philippine National Bank,* 245 N. Y. 116, *cert. den.,* 275 U. S. 549; *Appleton* v. *Citizens Central National Bank,* 190 N. Y. 417, *aff'd,* 216 U. S. 196; *Aldrich* v. *Chemical National Bank, supra; Nevada Bank* v. *Portland National Bank,* 59 Fed. 339 (D. Ore.); *National Bank of Commerce* v. *Equitable Trust Co.,* 227 Fed. 526 (C. C. A. 8), *cert. den.,* 239 U. S. 648.

CONCLUSION.

The resettled judgment of the Circuit Court of Appeals for the Second Circuit should be modified.

Respectfully submitted,

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